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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1231~~ 197

G. L. CHRISTIAN AND ASSOCIATES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

CASES:

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Johnson v. *United States*, 225 U.S. 405 (1912) 13

OPINIONS BELOW

The original opinion of the Court of Claims was rendered on January 11, 1963 and is reported in 312 F.2d 418. That court's opinion on motion for rehearing and reargument was rendered on July 12, 1963 and is reported in 320 F.2d 345. Certiorari on these interlocutory rulings was denied by this Court in 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964). Thereafter, the case was remanded to a Trial Commissioner of the Court of Claims and further proceedings were had under Rule 47(c) to determine the amount due petitioner. On February 19, 1965 the Trial Commissioner filed his recommendations on this issue to the court.

On March 11, 1965 petitioner filed a Motion for Relief under Rule 69(b) requesting the Court of Claims to reverse its earlier decisions. By order dated May 3, 1965, the Court of Claims denied said motion, adopted the Trial Commissioner's February 19, 1965 recommendations, and entered its final judgment. The opinions of the Court of Claims are contained in the Appendix A hereto.

As discussed *infra,* events occurring subsequent to this Court's previous denial of certiorari, required that relief be granted by the Court of Claims under Rule 69(b) and require that a writ be granted to review the order denying relief under that motion and entering final judgment.

JURISDICTION

The final judgment of the Court of Claims was entered on May 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255 (1958).

QUESTIONS PRESENTED

1. Whether the denial of petitioner's claim by the Court of Claims, based on its holding that a provision of the Armed Services Procurement Regulation (ASPR 8.703) is incorporated into petitioner's contract by operation of law, where such incorporation is contrary to the long-established administrative practice, is in conflict with such cases of this Court as *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1925) holding that the administrative interpretation must be given controlling weight unless clearly erroneous, and particularly where, as in this case, the judicially substituted rule is impractical, has resulted in confusion and the administrative agencies have failed to follow it, was improper?

2. Whether the denial of petitioner's claim by the Court of Claims, based on its holding that the deliberate omission by the Assistant Secretary of Defense (Properties and Installations) of a convenience termination article from petitioner's contract was unauthorized, is in conflict with the decisions of this Court such as *United States* v. *Coe*, 170 U.S. 681 (1897), holding that there is a presumption of legality that attaches to the acts of public officers, especially, as in the circumstances of this case, where the authority of the Assistant Secretary of Defense to have made the omission has *never* been questioned by the Government?

3. Whether the denial of petitioner's claim by the Court of Claims, based on its holding that there is a strong public policy against the recovery of anticipatory profits is in conflict with this Court's holding in *United States* v. *Speed*, 75 U.S. 77 (1868), allowing recovery of anticipatory profits and its own earlier

decision (*Klein* v. *United States*, 152 Ct. Cl. 8 (1961)), and its subsequent decisions (*Goldwasser* v. *United States*, 325 F.2d 722 (Ct. Cl. 1963); *Dale Constr. Co.* v. *United States*, No. 134-57, Ct. Cl., Dec. 11, 1964), also allowing recovery of anticipatory profits?

4. Whether the holding of the Court of Claims that provisions of the Armed Services Procurement Regulation relating to prime contracts are incorporated by law into *subcontracts* is in conflict with the rule of this Court set forth in *Merritt* v. *United States*, 267 U.S. 338, 340 (1925) that a subcontractor has no privity of contract with the Government?

STATUTES AND REGULATIONS INVOLVED

The contract involved was issued under the Capehart Act which is the popular name for Title IV of the Housing Amendments of 1955, ch. 783, 69 Stat. 646-54, 84th Cong., 1st Sess., as amended by Title V of the Housing Act of 1956, ch. 1029, 70 Stat. 1109-12, 84th Cong., 2d Sess., now found in slightly changed and codified form in 12 U.S.C. secs. 1748-1748g, 1720f (1958) and 42 U.S.C. secs. 1594-1594f (1958). It is not deemed necessary to set forth the entire Act. One pertinent section is set forth in Appendix B, *infra*.

The pertinent provisions of Section VIII of ASPR are also set forth in Appendix B.

STATEMENT

The facts as stated in the Findings of Fact and as found by Commissioner Mastin G. White of the Court of Claims, Appendix A, *infra*, p. 20a, are not contested by petitioner.

Petitioner was the prime contractor on a Capehart Act housing project contemplating the construction

of 2,000 dwelling units for the long-range needs of military personnel at Fort Polk, Louisiana. The contract consisted of the terms and provisions previously approved, pursuant to the Capehart Act, by the Federal Housing Commissioner and by the Assistant Secretary of Defense (Properties and Installations). The Capehart housing contract involved in this litigation does not contain any provision for suspension or termination of the work for the convenience of the Government, such provision having been intentionally omitted. In 1958 respondent unilaterally cancelled the contract.

Petitioner filed a timely petition in the Court of Claims under its jurisdiction as set forth in 28 U.S.C. sec. 1491 on behalf of itself and certain of its subcontractors to obtain payment of anticipatory profits and certain costs. The Commissioner found and recommended in his Report dated December 22, 1961 that petitioner and its specified subcontractors be awarded anticipatory profits and certain items of cost. After receiving the Commissioner's Report and hearing oral argument on December 5, 1962, the Court of Claims issued on January 11, 1963 its opinion together with findings of fact and conclusions of law which are set forth in Appendix A, *infra,* pp. 2a-68a.

In the second part of the opinion (Appendix A, *infra,* pp. 10a-19a), the court refused to allow recovery for the anticipatory profits of petitioner or of any of the subcontractors which normally would be allowable at common law for breach of contract. The court concluded that the Termination for the Convenience of the Government article set forth in section 8.703 of ASPR was incorporated as a matter of law into petitioner's Capehart housing contract.

Believing that the doctrine enunciated in the second part of the opinion was not only erroneous and novel, but was also a dangerous precedent, petitioner moved on the basis of a supporting brief for rehearing and reargument. On July 12, 1963, the Court of Claims rendered a detailed opinion rejecting petitioner's motion and holding again that section 8.703 of ASPR had the force and effect of law and hence must be read into this Capehart housing contract, regardless of the intent of the parties, or the wording of the contract.

Further proceedings were had under Rule 47(c)(1) to determine damages. On March 11, 1965 petitioner moved for relief under Rule 69(b)(2), (5) and (6) on the grounds that subsequent events required the Court of Claims to grant relief from its earlier decisions. By order dated May 3, 1965 the court denied said motion and entered final judgment.

REASONS FOR GRANTING THE WRIT

The Court of Claims decision is squarely in conflict with four fundamental and long-established principles of Government contracts enunciated by this Court, namely:

1. That the agency's interpretation of its own regulations should be controlling unless clearly erroneous.
2. That there exists a rebuttable presumption that the acts of a Government official are within his authority.
3. That anticipatory profits are recoverable from the Government for breach of contract.
4. That there is no privity of contract between the Government and a subcontractor.

Each of these four principles are cornerstones of the Government's vast procurement effort. Their disregard in the decision below has created confusion and chaos adversely affecting Government procurement as reflected in the subsequent events upon which petitioner's Motion for Relief under Rule 69(b) was based:

1. The failure of the Court of Claims to follow its decision below in at least two subsequent decisions, *Goldwasser* v. *United States, supra* and *Dale Constr. Co.* v. *United States, supra.*

2. Public acknowledgement by top Government procurement officials that the decision below is contrary to the intent of the drafters of the procurement regulations. (See letter dated December 16, 1964 of Paul A. Barron to Col. Roger M. Terzian, Chairman, ASPR Committee).

3. The failure of Government procurement lawyers to assert the *Christian* rule and the failure of the Armed Services Board of Contract Appeals to apply such rule. *Valley Cleaners,* ASBCA No. 10253, 65-1 BCA ¶ 4720.

4. The Court of Claims issued an order on February 5, 1965 in the instant case dismissing respondent's counterclaim against a subcontractor on the ground of lack of privity between respondent and the subcontractor. This order is inconsistent with the opinion of the Court of Claims in this case dated July 12, 1963 (320 F.2d 345), wherein it was held that procurement regulations relating to Government contracts are incorporated into subcontracts by operation of law.

1. The Decision Below Conflicts With Bowles v. Seminole Rock Co., 325 U.S. 410 (1925) and Established Unworkable Procedures.

The Court's holding that ASPR 8.703 is incorporated into contracts by operation of law is (a) in direct conflict with the prevailing administrative practice and (b) is unworkable.

(a) The prevailing administrative practice is well illustrated by the following letter from the General Services Administration officials responsible for procurement regulations, addressed to the Chairman of the ASPR Committee:

> December 16, 1964
>
> Colonel Roger M. Terzian
> Chairman, ASPR Committee
> Department of Defense
> Washington, D. C. 20301
>
> Dear Colonel Terzian:
>
> As you know, considerable uncertainty has crept into the administration of Government contracts as a result of the decision of the Court of Claims in G. L. Christian and Associates v. The United States . . . .
>
> * * *
>
> As the ASPR [Armed Services Procurement Regulations] has been administered by DOD and the FPR [Federal Procurement Regulations] by GSA, the doctrine of the Christian case would achieve results which, we believe, have not been intended by either regulation. While regulations may have the force of law, not all regulations are directed at the same categories of persons or activities and, absent clear intent, regulations governing contracting are traditionally not intended involuntarily to subject contractors to contract terms without their knowledge and consent. This is so for a number of reasons, not the least of

which is the fact that public contract matters are exempt from the Administrative Procedure Act requirements for notice of proposed rule making.*

* * *

Because of the unintended results that might frequently flow from particular applications of the Christian doctrine so as to regulate into existence contract terms contrary to the actual intent of the parties, and based on informal discussions with a representative group of major procuring agencies, it is considered important to consider remedial steps to avoid such unintended results.

The enclosed FPR language has been drafted with this thought in mind and is submitted for your review and comment on the proposed policy and suggestions on proposed language.

/s/ PAUL A. BARRON
Paul A. Barron
Assistant General Counsel
Regulations and General
Law Division

* See enclosed note. [For this enclosure to letter see Appendix C.]

This same administrative practice, that Section VIII of ASPR is inapplicable to contracts which do not specifically incorporate that section by reference, has always been followed by the Departments of the Army, Navy, Air Force and Defense. See Pamphlet 27-153 entitled *Procurement Law* (1961) at 407; *Navy Contract Law* (1959) at § 5.29; *Air Force Procurement: Prices and Profits* (1953) at 113; and Department of Defense, ASPR 8-101 and 8-102. For the text of pertinent portions of these documents see Appendices B and D.

The uncertainty created by the decision of the Court of Claims is demonstrated by the following excerpt

from the Federal Contracts Report (No. 46, January 4, 1965), published by the Bureau of National Affairs, Inc.:

> CONTRACT CLAUSES: *Agencies Study Ways of Easing Mandatory Effect of* CHRISTIAN *Case Ruling*
>
> What to do about the far-reaching effects of the so-called "Christian doctrine"—under which the whole body of agency procurement regulations can be considered part of every individual contract—is now under formal study by federal procurement agencies.
>
> The doctrine stems from the Court of Claims' 1963 ruling in G. L. Christian & Associates v. U. S. 312 F. 2d 418, cert. den. 375 U.S. 954. From that landmark decision flowed two propositions: (1) that a procurement regulation issued pursuant to statute has "the force and effect of law," and (2) that as a result, contracts may be governed by provisions of the regulations even though these are not incorporated or referred to in the contract terms.
>
> The reaction of the contracting community, including many government quarters, is that the second proposition is much too broad, leading to all sorts of complications that were certainly not intended by either the drafters of the procurement regulations or the companies entering into government contracts.
>
> * * * * * * * * *

(b) The unworkability of the so-called *Christian* rule is commented upon in a recent case in which the Armed Services Board of Contract Appeals did not follow the rule and the Government did not ask that it do so. *Valley Cleaners, supra.*

The *Valley Cleaners* case involved a question as to the manner of computing a concession fee for the appellant who operated under contract a drycleaning

and laundry concession for the Exchange Service at certain Air Force installations. The Board agreed that the express provisions of the contract supported the method of computation advanced by the appellant. The Government, however, asserted that controlling was Air Force Regulation (AFR) 147-17, par. 69.b., which provided a method of computation different than the one set forth in the contract.

The Board stated:

> To say that a contract is "subject to the provisions of all applicable Army and Air Force regulations now in effect or hereinafter promulgated" imposes on the contractor an awesome task and responsibility. We might add that it imposes a similarly awesome task and responsibility on the contract administrator. We are given to wonder whether there are many people, in Government, industry or academics who are fully equal to this task. In other words, we have grave doubts as to whether such a clause is reasonable and effective for incorporation by reference in a contract of any and every regulation now in existence or hereafter to be published. Certainly, such a shotgun approach is not effective for that purpose in the absence of actual knowledge, or at least constructive knowledge by the contractor of the particular regulation involved. Neither has been shown by this record. Nor will we presume either without evidence of the manner of publication and distribution of the regulation concerned.
>
> We are not unmindful of the *Christian* case doctrine. The essence of our holding in the previous paragraph is that the quoted clause itself does not effect the incorporation. Respondent does not argue that the regulation concerned is otherwise incorporable under the *Christian* case. [pp. 22,481-82]

Other cases in which Government agencies, including the General Accounting Office, have refused to follow the Christian rule are: *World Electrical Specialties Corp.*, ASBCA No. 9510, 65-1 BCA ¶ 4679; *Aero Corp.*, ASBCA No. 8178, 1963 BCA ¶3665; *Homer Electric Assn., Inc.*, ASBCA No. 7649, 1962 BCA ¶ 3608; Comp. Gen. Dec. *B-151787*, Sept. 3, 1963.

In commenting upon the General Accounting Office's failure in the opinion cited above to follow the *Christian* rule, the *Government Contractor, published* by Federal Publications, Inc. stated:

> Things seem to be getting very confusing for contractors. Simply determining which clauses a contract contains—a matter which used to be ascertainable by the straightforward method of reading the words of the contract itself—has now become a major project based partly on guesswork. The mere statement of this Alice-in-Wonderland situation, without further elaboration, would seem to be sufficient to indicate that reforms are needed. [5 GOVT CONT. ¶ 442 (1963)]

The foregoing demonstrates the confusion that results from a failure to follow the rule laid down by this Court that the administrative interpretation should be given controlling weight unless clearly erroneous. *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1925).

2. The Decision Below Conflicts With United States v. Coe, 170 U.S. 681 (1897) and Establishes an Unworkable Rule Which, If Followed, Would Bring Government Operations to a Standstill.

The Capehart Act (42 U.S.C. § 1594) provides that the "Secretary of Defense *or his designee* is authorized to enter into contracts * * * to provide for construction * * *." [Emphasis supplied.]

The contract form used in the present case, intentionally omitting a clause providing for a Termination for Convenience of the Government, was approved and signed by the Assistant Secretary of Defense for Properties and Installations. The Government has never asserted that the Assistant Secretary lacked authority not to include a convenience termination article.

Notwithstanding that the issue of authority was never raised, the Court of Claims *sui sponti*, found a lack of authority on the basis "there is lacking any proof that this particular Assistant Secretary was empowered to approve alterations in articles mandatorily required by ASPR" (320 F.2d 345, 353 (1963), pp. 81a-82a, *infra*).

The court has thus imposed upon a plaintiff, after trial and the filing of briefs, the burden of showing authority of a Government agent where lack of such authority had not been asserted by the Government. This decision is in conflict with one of the oldest and strongest presumptions of Government activity, that is, the presumption that a public officer in the performance of an official act not only took all necessary preliminary steps required but acted within the scope of his authority and that there is, accordingly, a presumption in favor of the legality of that act. Relying on the decisions of this Court, the Court of Claims itself has stated the rule in *Lamport Mfg. Supply Co.* v. *United States*, 65 Ct. Cl. 579, 610 (1928). See, *Stearns Co.* v. *United States*, 291 U.S. 54, 63 (1933); *United States* v. *Chemical Foundation*, 272 U.S. 1, 12, 13 (1926); *Johnson* v. *United States*, 225 U.S. 405 (1912); *United States* v. *Coe*, 170 U.S. 681, 697 (1897); *United States* v. *Pugh*, 99 U.S. 265, 271 (1879).

The decision of the Court of Claims is in conflict with all of the cited cases, including its own.

3. The Decision Below Is in Conflict with United States v. Speed, 75 U.S. 77 (1868) Which Held That the Recovery of Anticipatory Profits Is Not Against Public Policy.

The Court of Claims held that recovery of anticipatory profits is against public policy and used this determination to justify its further holdings that the convenience termination article was incorporated into petitioner's contract by operation of law and that the Assistant Secretary did not have authority to omit it from a Capehart contract.

The determination of the Court of Claims that anticipatory profits are against public policy is in conflict with one of the oldest decisions applicable to Government procurement, *United States* v. *Speed*, 75 U.S. 77 (1868) which allowed recovery of anticipatory profits. The unbroken chain of precedents that followed the doctrine of the *Speed* case include such landmark decisions as *Klein* v. *United States, supra; United States* v. *Spearin,* 248 U.S. 132 (1918); *United States* v. *Behan,* 116 U.S. 338 (1884).

The rule of the *Speed* case is restated in various Government procurement manuals, as well as in Government procurement regulations. See *Procurement Law* (1961) at 390 (Department of the Army), *Procurement Handbook* (1959) at 99 (General Services Administration), *Navy Contract Law* (1959) at § 5.6 (Department of the Navy), and Federal Procurement Regulations § 1-8.201(b). For the text of pertinent portions of these documents see Appendix D, pp. 92a-94a, *infra.*

Subsequently, the Court of Claims has refused to follow its decision below and has correctly applied the *Speed* rule and has allowed anticipatory profits. See *e.g., Goldwasser* v. *United States, supra; Dale Constr. Co.* v. *United States, supra.*

The decision below is in conflict with this Court's decision in *United States* v. *Speed, supra,* and a century of cases following the *Speed* case, including its own cases subsequent to the decision below. In only the case below, as far as petitioner is aware, has a federal court held there is a public policy against recovery of anticipatory profits from the Government for breach of contract.

4. The Decision Below Is in Conflict with Merritt v. United States, 267 U.S. 338 (1925) Holding There Is No Privity of Contract Between the United States and a Subcontractor.

Petitioner seeks this writ of certiorari on behalf of four of its subcontractors as well as itself. The decision below also held that the ASPR convenience termination article was incorporated into *subcontracts.*

This holding is in conflict with the decision of this Court that there is no privity of contract between the Government and subcontractors. *Merritt* v. *United States,* 267 U.S. 338, 340 (1925). By no stretch of the imagination can it be said that regulations promulgated to guide the administration of prime contracts can force the inclusion of a convenience termination article into subcontracts as a matter of law.

The Court of Claims has not stated the basis upon which it concluded that the many procurement regulations are applicable to subcontracts as well as to prime contracts. Not only in the decision below plainly incorrect but also it creates further choas since there is no possible way of knowing which ASPR provisions are in or are not in subcontracts.

CONCLUSION

The decision below conflicts with four cornerstone principles of Government contracting established by decisions of this Court which are of such long-standing that their validity is no longer questioned. These principles had been incorporated in Government procurement manuals and had become axiomatic. The removal of these foundations has caused chaos and confusion among contractors and Government personnel, especially as to what constitutes a Government contract. Thereby, the entire Government procurement structure involving many billions of dollars annually is substantially weakened and seriously endangered. The Government-wide importance of the issues is evident.

For the reasons stated herein, it is respectfully submitted that this Court should give renewed strength to the vital Government procurement structure by affirming the continued existence of the four Government contracting principles established by this Court but ignored by the decision below by granting this petition and by ultimately reversing the decision below.

Respectfully submitted,

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